



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2003

Ms. Laura Garza Jimenez
Nueces County Attorney
County of Nueces
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2003-5463

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185485.

Nueces County (the "county") received one request for documents concerning the "Informal Exploratory Committee" (looking into Jail issues and/or inmate diversion program) formed by the Commissioner's Court." The county received a second request from the same requestor for: "1) all videos (and all videos and documents used in the creation of same) created by the [county] Sheriff's Department concerning any concerns/problems with inmate suicide and/or inmate crisis intervention and 2) all videos created by and/or pertaining to any Jail Extraction Team at the [county] Jail." You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an individual associated with the requestor's law firm. *See Gov't Code § 552.304* (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides that a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code § 552.301(b)*. You state that the county received the written requests for information on

May 16, 2003. Therefore, the county had until June 2, 2003 to request a decision from us as to whether any portion of the non-videotape requested information could be withheld from disclosure. However, the county did not request a decision from us concerning any portion of that particular information until June 6, 2003, more than ten business days after the date that the county received the written requests for information. Thus, we find that the county failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us with respect to all of that particular information.

Because the county failed to comply with the procedural requirements of section 552.301, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The county must demonstrate a compelling interest in order to overcome the presumption that this particular information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the county claims that the non-videotape requested information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this particular exception to disclosure is a discretionary exception to disclosure under the Public Information Act that does not constitute a compelling interest that is sufficient to overcome the presumption that this particular information is now public.¹ Further, we note that, although the county claims that this particular information is also excepted from disclosure pursuant to section 552.108 of the Government Code, the county in this instance has not demonstrated a compelling interest under this exception to disclosure that would allow any portion of this particular information to be withheld from disclosure. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

reason for nondisclosure under section 552.108 in certain circumstances). Accordingly, we conclude that the county may not withhold any portion of the non-videotape requested information under sections 552.103 or 552.108 of the Government Code. However, since the county claims that a portion of this particular information is excepted from disclosure pursuant to section 552.101 of the Government Code, we will address that claim with respect to that particular information.

Next, we must address section 552.007 of the Government Code. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007; see also Open Records Decision No. 518 at 3 (1989)*. You acknowledge that the portion of the submitted jail extraction videotape pertaining to Laura Hernandez has been shown to her attorney. You also acknowledge that three other submitted videotapes that were either created by the county's sheriff's department concerning any concerns/problems with inmate jail suicide and/or inmate crisis intervention or used in the creation of same and which are numbered 9 and 10 were shown to three individuals who are not county officials or employees. Because the county voluntarily disclosed this particular information to members of the public, we find that the county may not now withhold such information, unless the release of any portion of the information is expressly prohibited by law. *See Gov't Code § 552.007*. Accordingly, we conclude that the county may not withhold the portion of the submitted jail extraction videotape pertaining to Laura Hernandez or any portion of the other three above-described videotapes under sections 552.103 or 552.108 of the Government Code. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 349 (1982) (finding that once information has been obtained by all parties to anticipated litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information), 320 (1982)*. Consequently, the county must release to the requestor the portion of the submitted jail extraction videotape pertaining to Laura Hernandez. However, since the county claims that portions of the other three above-described videotapes are excepted from disclosure pursuant to section 552.101, we will address that claim with respect to these particular videotapes.

In addition, we note that we previously addressed the remaining portions of the submitted videotape depicting the jail extraction of Laura Hernandez, as well as all of the remaining submitted jail extraction videotapes, in Open Records Letter No. 2002-5432 (2002). Specifically, we ruled in that decision that the county may withhold the above-described information pursuant to section 552.108(b)(1) of the Government Code. You do not inform

us that the law, fact, and circumstances on which that ruling was based have not changed since the issuance of that ruling. Accordingly, we conclude that the county may rely on our decision in Open Records Letter No. 2002-5432 (2002) with respect to the above-described information submitted in this instance. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).²

We now address your claim that the remaining submitted videotapes are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The county maintains the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the government body receives the request and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d

² Because we base our ruling regarding this particular information on Open Records Letter No. 2002-5432 (2002), we need not address your remaining arguments regarding this information.

210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The county must meet both prongs of this test for information to be excepted under 552.103.

Based on our review of your arguments and the remaining submitted videotapes, we conclude that the county has demonstrated that litigation was pending against the county on the date that it received these requests for information and that the remaining submitted videotapes are related to that pending litigation for purposes of section 552.103. Accordingly, we conclude that the county may withhold the remaining submitted videotapes in their entirety pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in such pending litigation is not excepted from disclosure under section 552.103. Further, the applicability of section 552.103 ends once the litigation is no longer pending. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

You also claim that a portion of the submitted documents, as well as portions of the three submitted videotapes that were either created by the county's sheriff's department concerning any concerns/problems with inmate jail suicide and/or inmate crisis intervention or used in the creation of same and which are numbered 9 and 10, are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.³ We note that common-law privacy protects information if (1) it contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683.

³ Section 552.101 of the Government Code excepts from disclosure information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

Based on our review of your arguments and the information at issue, we find that portions of the submitted documents are protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the county must withhold the information that we have marked within the submitted documents pursuant to section 552.101 in conjunction with the common-law right to privacy. However, we also find that there is a legitimate public interest in the release of the remainder of the information at issue. *See Open Records Decision No. 444 (1986)* (public has legitimate interest in conduct of law enforcement officials). Accordingly, we also conclude that the county may not withhold any portion of the remainder of the information at issue under section 552.101 of the Government Code in conjunction with the common-law right to privacy. Consequently, the county must release to the requestor the entirety of the three submitted videotapes that were either created by the county's sheriff's department concerning any concerns/problems with inmate jail suicide and/or inmate crisis intervention or used in the creation of same and which are numbered 9 and 10.

We note that the submitted documents contain social security numbers that may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law. Section 552.101 also encompasses information that is protected from disclosure by other statutes. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622 (1994)*. The county has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the county, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the county should ensure that they were not obtained and are not maintained by the county pursuant to any provision of law enacted on or after October 1, 1990.

Further, we note that the submitted documents contain Texas motor vehicle information that is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code § 552.130*. Accordingly, we conclude that the county must withhold the Texas motor vehicle

information that we have marked within the submitted documents pursuant to section 552.130 of the Government Code.

Finally, we note that a portion of the submitted documents is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the county must release to the requestor the portion of the submitted jail extraction videotape pertaining to Laura Hernandez. The county may rely on our decision in Open Records Letter No. 2002-5432 (2002) with respect to the remaining portions of the submitted videotape depicting the jail extraction of Laura Hernandez, as well as all of the remaining submitted jail extraction videotapes, and withhold this particular information pursuant to section 552.108(b)(1) of the Government Code. Other than the three submitted videotapes that were either created by the county's sheriff's department concerning any concerns/problems with inmate jail suicide and/or inmate crisis intervention or used in the creation of same and which are numbered 9 and 10, the county may withhold the remaining submitted videotapes in their entirety pursuant to section 552.103 of the Government Code. The county must withhold the information that we have marked within the submitted documents pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The county must release to the requestor the entirety of the three submitted videotapes that were either created by the county's sheriff's department concerning any concerns/problems with inmate jail suicide and/or inmate crisis intervention or used in the creation of same and which are numbered 9 and 10. Social security numbers that are contained within the submitted documents may be confidential under federal law. The county must withhold the Texas motor vehicle information that we have marked within the submitted documents pursuant to section 552.130 of the Government Code. The county must release the remaining submitted information to the requestor in compliance with applicable copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

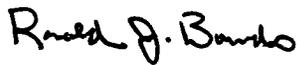
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

Ms. Laura Garza Jimenez - Page 9

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 185485

Enc. Marked documents and submitted videotapes

c: Mr. Christopher J. Gale
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205
(w/o enclosures)

Ms. Beverly West Stephens, Esq.
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205
(w/o enclosures)